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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 IN RE FACEBOOK BIOMETRIC
INFORMATION PRIVACY LITIGATION

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18 THIS DOCUMENT RELATES TO:
19 ALL ACTIONS
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Master Docket No.: 3:15-CV-03747-JD

**DEFENDANT FACEBOOK, INC.'S
MOTION FOR LEAVE TO FILE ITS
AMENDED ANSWER; MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: November 10, 2016
Time: 10:00 a.m.
Location: Courtroom 11

Hon. James Donato

[Proposed Order filed concurrently herewith]

NOTICE OF MOTION & MOTION FOR LEAVE

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on November 10, 2016, at 10:00 a.m., before the Honorable James Donato, defendant Facebook, Inc. (“Facebook”) will and hereby does move pursuant to Federal Rule of Civil Procedure 15(a)(2) for an order granting leave of the Court for Facebook to file its Amended Answer and Affirmative Defenses to Plaintiffs’ Complaint (“Amended Answer”), attached to this motion as Exhibit A.

Facebook seeks to file its Amended Answer to add an affirmative defense: that the Illinois Biometric Information Privacy Act is unconstitutional as Plaintiffs seek to have it applied in this case because, for example, its application would violate the dormant Commerce Clause.

As described in the Declaration of John Nadolenco filed in support of this motion, Facebook asked Plaintiffs' counsel to consent to the filing of the Amended Answer, but Plaintiffs' counsel has not yet responded to that request.

Facebook's motion is based on this notice of motion and motion, the below memorandum of points and authorities, the declaration filed in support of the motion, the pleadings, papers, and other documents on file in this action, and such other evidence and argument presented to the Court at or prior to any hearing in this matter.

Facebook does not request oral argument on this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

Facebook files this motion to request leave from the Court to file its Amended Answer. Under Federal Rule of Civil Procedure 15(a)(2), “[t]he court should freely give leave when justice so requires.” This standard reflects an intent to allow amendment with “extreme liberality.” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987). In ruling on a motion for leave to amend, “courts consider five factors: (1) undue delay; (2) bad faith; (3) prejudice to the opposing party; (4) futility of the amendment; and (5) whether previously allowed amendments have failed to cure deficiencies.” *Esurance Ins. Co. v. Westchester Fire Ins. Co.*, 2016 WL 4719264, at *1 (N.D. Cal. Sept. 9, 2016). The most important factor is

1 whether there would be prejudice to the opposing party. *Eminence Capital, LLC v. Aspeon, Inc.*,
2 316 F.3d 1048, 1052 (9th Cir. 2003).

3 All of the relevant factors support granting Facebook leave to amend. Requesting leave
4 to amend at this time is consistent with the September 30, 2016 deadline for adding parties or
5 amending pleadings established by the Court's July 27, 2016 Scheduling Order. Discovery is
6 ongoing, and Plaintiffs will accordingly have the opportunity to develop any facts that may relate
7 to the defense Facebook seeks to add. Thus, there has been no undue delay and Plaintiffs would
8 not be prejudiced if the Court grants the motion. This is Facebook's first request to amend its
9 answer, and the amendment would add a defense that Facebook believes to have merit.

10 In light of the liberal standard for amendment, the motion should be granted.
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1 Dated: September 30, 2016

MAYER BROWN LLP

2 By: /s/ John Nadolenco
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Counsel for Defendant Facebook, Inc.